IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1576

LOUIS MARTIN RADETSKY,
a/k/a L. M. RADETSKY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on March 29, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not been published, appears in Appendix A hereto. No written opinions were rendered by the United States District Court for the District of Colorado.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 29, 1976. This petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment failed to meet the standards of specificity required by the fifth amendment to the United States Constitution.

2. Whether the submission of the Government's bill of particulars to the jury violated defendant's fifth amendment right to be tried solely on the charges contained in the grand jury's indictment.

3. Whether the introduction into evidence of medical records, used by defendant solely for the purpose of treating his patients, constituted a violation of the fifth amendment's protection against compulsory self-incrimination.

4. Whether the prosecutor's improper admonition of secrecy to witnesses appearing before the grand jury constituted a denial of defendant's fifth amendment rights and entitled him to pretrial inspection of grand jury transcripts.

CONSTITUTIONAL PROVISION, STATUTES, AND COURT RULE INVOLVED

The constitutional provision involved is the fifth amendment to the United States Constitution. It is printed in Appendix B *infra*, at p. 1b.

The relevant statutory provisions concerning the nature of a Colorado professional medical service corporation and the nature of physician-patient relationship thereunder are COLO. REV. STAT. ANN. 1973, 12-36-134 [formerly COLO. REV. STAT. ANN. 1963, 91-3-37, as amended (Perm. Cum. Supp. 1969)] and COLO. REV. STAT. ANN. 1973, 13-90-107(1)(d) [formerly COLO. REV. STAT. ANN. 1963, 154-1-7(5)]. They are printed in Appendix B *infra*, at pp.

The relevant court rule is Rule 6(e) of the Federal Rules of Criminal Procedure. It is printed in Appendix B. *infra*, at p. 1b.

STATEMENT OF THE CASE

1. Introduction

Louis Martin Radetsky is a doctor of osteopathy, licensed under the laws of Colorado. He is actively engaged in the practice of osteopathic medicine at the South Denver Clinic in Denver, Colorado. He served as chairman of the department of medicine at Rocky Mountain Hospital for the ten years immediately preceeding the trial of this case and was the chief-of-staff at that hospital in 1957 and 1958.

On November 9, 1973, Dr. Radetsky was indicted on 41 substantive counts under 18 U.S.C. §§ 1001 and 1002. In essence, these counts alleged that Radetsky had knowingly concealed material facts from, and had made false statements to, Colorado Medical Services, Inc., the paying agent for Medicare funds pursuant to a contract with the Social Security Administration. The indictment also contained an additional count under 18 U.S.C. § 371, alleging a conspiracy to defraud among Radetsky, Marie Standefer, Richard E. Griffin, Gwendolyn Alice Green and Carolyn Largent. Griffin, Green and Largent were not indicted.[1]

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[1]Marie Standefer was indicted as a co-defendant on all counts. Pursuant to a motion by the Government, Standefer's trial was severed from that of Radetsky. Subsequently, Standefer plead guilty to a misdemeanor under 42 U.S.C. § 408, and all other charges against her were dismissed.

The Government dismissed counts 20, 21 and 37 prior to trial and the trial court entered a judgment of acquittal on the conspiracy count at the close of the evidence. The jury returned a verdict of acquittal on counts 1-6 and convicted Radetsky on counts 7-19, 22-36, and 38-41. At sentencing, the trial court imposed a fine on defendant of $1,500 for each count, or a total fine of $48,000. On June 27, 1974, Radetsky filed a notice of appeal to the United States Court of Appeals for the Tenth Circuit.

On March 29, 1976, the United States Court of Appeals for the Tenth Circuit rendered its decision affirming Radetsky's conviction on counts 7, 8, 11, 15, 28 and 36. The convictions on counts 9-14, 16-19, 22-27, 29-35, 38-39 and 40-41 were reversed on the ground that the false statements alleged therein were immaterial as a matter of law because they involved drugs which were noncompensable under the guidelines established by the paying agent for Medicare.[2]

2. The Indictment and Bill of Particulars

The 41 substantive counts of the indictment alleged that Radetsky had submitted certain request for payment forms containing false information to the paying agent for Medicare. Each count related to one such request form for

[2]The Court of Appeals' opinion reveals that the three-judge panel was deeply split with respect to the issues raised on appeal. Judge Holloway, writing the opinion of the court, concluded that the convictions on 26 counts should be reversed because the alleged false statements relating to those counts were not material. Chief Judge Lewis, dissenting, asserted that submission of the Government's bill of particulars to the jury constituted reversible error as to all counts. Judge Barrett, concurring in part and dissenting in part, would have affirmed on all counts.

one patient.[3] Each request for payment form listed a multiplicity of patient visits for periods covering from one to six months; specified from 14 to 75 separate services rendered to the patient during the period; and itemized from 7-49 separate charges for those services. The indictment did not identify which of the numerous statements contained on the request forms were allegedly false; it merely categorized them into one of four groups:

> (1) The patients actually received medical services less frequently than stated on the Requests for Payment (dates in parentheses hereinbelow indicate those when the patient did not receive any medical service), (2) the Requests for Payment did not fully, truly, and accurately describe the medical procedures and services for each date given as required (indicated hereinbelow by the word "services"), (3) the Requests for Payment did not disclose that the amount shown as charges for services were at a higher rate and more than the customary charges of South Denver Clinic, Inc., to either Medicare on non-Medicare patients for the same services (indicated hereinbelow by the word "charges"), and (4) the amounts shown on the Requests for Payment as already paid by the patients against such charges were inflated (indicated hereinbelow by the words "amount paid"). . . .

The indictment then proceeded to list for each count the date of the claim form; the time period covered by the form; the patient's name; and whether the alleged false statement related to dates on which services were rendered, services, charges and/or amount paid.[4]

[3]The Court of Appeals included two such request for payment forms at pp. ix-x of the Appendix to its opinion.

[4]The Court of Appeals included a copy of portions of the indictment at pp. i-iv of the Appendix to its opinion.

On December 3, 1973, defendant filed a written motion to dismiss on the ground that the indictment failed to meet the specificity requirements of the fifth amendment to the United States Constitution.[5] The trial court denied this motion; however, the court did require the Government to furnish a bill of particulars identifying those statements on each request form which were allegedly false.

In response to the trial court's order, the Government filed a 15-page bill of particulars which merely listed numerous discrepancies between defendant's office records and the request for payment forms. On some counts, the Government's bill of particulars challenged all items on the request for payment form, while on other counts only a few of the items on the request form were challenged as falsifications.[6]

After the close of the evidence, the United States Attorney moved to have the bill of particulars submitted to the jury for use in its deliberations. Both the prosecutor and the trial court acknowledged that the jury could not determine from the indictment which statements on the request forms constituted the basis for the grand jury's charges.[7] The defendant objected to submitting the bill of particulars to the jury on the grounds that (1) any attempt to cure defects in the indictment by submission of the bill of particulars to the jury would violate defendant's fifth

[5]The motion to dismiss based on insufficiency of the indictment was renewed and denied immediately prior to trial and again at the close of the evidence.

[6]For example, on count 36 only 10 of the 40 statements relating to services on the request form were claimed to be false. *See* p. 10 of the Court of Appeals' opinion.

[7]In his argument for sending the bill of particulars to the jury, the prosecuting attorney stated in part:

> "My concern is that if we don't send the Bill of Particulars, the jury is going — they may well convict on one of the items listed on the request for Payment which hasn't even been challenged by the United States, and I think it would all be kind of a nullity in the process."

The trial court stated:

> Well, the Court has given some thought to the Bill of Particulars since yesterday afternoon. I have come to the conclusion that in view of the multicharges within the various Counts, that it's the only sensible thing to do, and the Court will do it, because it appears to the Court that a Bill of Particulars of this nature and in this type of case is almost a necessity if the jury is going to return an intelligent verdict.

amendment rights; (2) the bill of particulars would only serve to confuse the jury; and (3) it was fundamentally unfair to give the jury a 15-page statement which, in essence, merely contained the Government's theory of the case. The trial court granted the Government's request and submitted the bill of particulars to the jury over defendant's objection.

Judge Holloway, writing the opinion for the Court of Appeals, recognized that the issues of whether the indictment met the fifth amendment requirements of specificity and whether defendant had been convicted on charges other than those contained in the grand jury's indictment raised substantial constitutional issues which were "serious and not free from doubt . . ." He concluded, however, that the indictment was constitutionally adequate. He further concluded that submission of the bill of particulars to the jury, while improper, did not constitute prejudicial error. Chief Judge Lewis, dissenting, determined that a bill of particulars should never be submitted to the jury and that in the present case prejudice to the defendant was "glaringly apparent."

3. The Patient Records

At the time of the alleged offenses, defendant and his wife were the sole shareholders in, and defendant was

president of, the South Denver Clinic, a professional medical corporation organized under the Colorado Medical Practice Act.[8] On July 6, 1973, a grand jury subpoena duces tecum was issued to the South Denver Clinic. The subpoena required the production of four categories of patient records:

> 1. Patient charts, which contain the name of the patient; the nature of his or her illness; the dates on which treatment was given; and the specific nature of the treatment given;
>
> 2. "Blue slips," prepared for the patient on each visit which contain the name of the patient; the date of the office call and the charge for services rendered;
>
> 3. IBM cards, which indicate the name of the patient; the dates on which the patient had been seen; the attending physician and general nature of the treatment by code number; and the charge;
>
> 4. Day sheets, which contain a list of all patients seen on a particular date and the charge for the services rendered.[9]

The South Denver Clinic and Dr. Radetsky moved to quash the grand jury subpoena. They asserted that the documents in question were Radetsky's personal records used solely for the purpose of treating his patients, and thus, the fifth amendment to the United States Constitution prohibited their production over his objection. The motion to quash was denied.

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[8]COLO. REV. STAT. ANN. 1973, 12-36-134 [formerly COLO. REV. STAT. ANN. 1963, 91-3-37, as amended (Perm. Cum. Supp. 1969)].

[9]All of the subpoenaed documents related to treatment given by the defendant to his patients. This is especially true of the patient charts which contained no financial information whatsoever and which were used solely for the purpose of providing proper medical care.

After the indictment was returned, Radetsky moved to suppress all of the records subpoenaed by the grand jury on the ground that their introduction into evidence would violate defendant's fifth amendment right to be free from compulsory self-incrimination. The trial court denied this motion on December 21, 1973.

The Court of Appeals determined that the records in question belonged to the professional corporation. The court further held that by forming a professional corporation, defendant had relinquished any fifth amendment rights which he might otherwise have been entitled to with respect to these records.

4. The Admonition of Secrecy

The prosecuting attorney instructed each witness who appeared before the grand jury that he should not discuss his grand jury testimony with anyone without first obtaining permission from a judge of the United States District Court. For example, after Dr. Griffin finished testifying before the grand jury, he was admonished by the prosecutor as follows:

> At this time Dr. Griffin, it is my duty to advise you that the Grand Jury proceedings are confidential by court order. The fact that you have been here, the questions which were asked, and the answers which were given are not to be discussed with anyone, and if you feel the need to do so, you should first seek the permission of U.S. District Judge through your attorney, Mr. Creamer.

The record reflects that Dr. Griffin, one of the key witnesses who gave damaging testimony against Radetsky on the questions of knowledge and intent, refused to talk with Dr. Radetsky, his attorneys, or his investigator. The record further shows that the only other source of infor-

mation concerning Dr. Griffin's knowledge of the facts was the transcript of his grand jury testimony.

On December 3, 1973, Radetsky filed a motion for discovery which, *inter alia*, requested inspection of the transcripts of testimony given by witnesses before the grand jury. Radetsky's motion claimed that an examination of the grand jury testimony was essential to the preparation of his defense, and that he had no alternative method of obtaining the information contained therein.[10] The trial court denied the motion except for compliance with the Jencks Act. Radetsky was not permitted to inspect any grand jury transcripts until after the trial had commenced.

The Court of Appeals held that an admonition of secrecy to grand jury witnesses clearly violated Rule 6(e), but found that neither this violation, nor the refusal of pretrial inspection of grand jury transcripts, was prejudicial to the defendant.

REASONS FOR GRANTING THE WRIT

1. This case presents important constitutional issues involving the fifth amendment's guaranty that a defendant

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[10]The hearing on defendant's motion for discovery was held on December 21, 1973. At that time, defendant's counsel knew that Dr. Griffin would not discuss anything relating to Dr. Radetsky with either defense counsel or an investigator hired by the defendant. What counsel did not know was the reason for Dr. Griffin's refusal — i.e., that the United States Attorney had imposed an obligation of secrecy on the grand jury witnesses. It was only after defense counsel began to receive the grand jury transcripts during the trial that he learned of the United States Attorney's violation of Rule 6(e). Thus, the fact that the trial court was not informed of what undoubtedly would have constituted a particularized need for inspection of grand jury transcripts was due solely to the prosecuting attorney's failure to reveal that he had imposed such an obligation of secrecy on the witnesses.

may be tried only upon charges contained in a grand jury indictment. In attempting to resolve these issues, the Court of Appeals misapplied the decision of this Court in *Russell v. United States*, 369 U.S. 749 (1962). *Russell* clearly defines the functions which an indictment must fulfill. A primary requirement is that the indictment must be sufficiently precise to inform the defendant, prosecutor, trial court, and jury of the basis for the charges contained therein. If the indictment does not meet this test of specificity, danger exists that the defendant might well be tried and convicted for acts other than those on which the grand jury intended to indict. Furthermore, it is constitutionally impermissible to bolster a defective indictment by means of a bill of particulars. As this Court stated in *Russell, supra:*

> But it is a settled rule that a bill of particulars cannot save an invalid indictment. . . . To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. 369 U.S. at 770.

Of course, the sufficiency of the indictment under the *Russell* guidelines must be judged in light of the facts of each case. In the case at bar, it is simply impossible to determine which of the numerous items listed on each request for payment form constituted the basis for the grand jury's indictment. For example, count 36 of the indictment merely alleges that Radetsky made false statements with respect to charges. An examination of the

applicable request for payment form reveals that 40 separate charges are contained thereon. The indictment does not disclose which of these 40 items form the basis for the grand jury's charge in count 36[11]. A similar problem is presented with respect to counts 7, 8, 11, 15 and 28.

The opinion of the Court of Appeals not only ignores the fifth amendment protections which this Court sought to preserve in *Russell*, but also poses a significant threat to the just and proper enforcement of 18 U.S.C. §§ 1001 and 1002. A substantial number of prosecutions under §§ 1001 and 1002, like the one here in question, involve allegedly false statements made on applications and informational forms submitted to Government agencies. Invariably such documents require voluminous data. When these documents are involved in prosecutions under §§ 1001 and 1002, constitutional rights can be preserved only if the indictment describes the allegedly false statements relied upon with enough precision to distinguish them from the vast number of other statements contained on the application or informational form. Yet, the opinion of the Court of Appeals for the Tenth Circuit in this case lends judicial approval to indictments which fail to meet this requirement. Furthermore, in holding that these deficiencies can be corrected by a bill of particulars, the Court of Appeals has approved what, in effect, amounts to indictment by the prosecuting attorney in such cases. This practice, of course, violates the specific mandate of *Russell, supra*.

2. The holding of the Court of Appeals that submission of the Government's bill of particulars to the jury over a defendant's objection does not constitute prejudicial error creates a conflict in principle with the decision of the Court of Appeals for the Fifth Circuit in *Pipkin v. United States*,

[11]The request for payment form involved in count 36 is found at p. x of the Appendix to the Court of Appeals' opinion.

243 F.2d 491 (5th Cir. 1957). Furthermore, in light of the facts of this case, the harmless error rationale relied upon by the Court of Appeals does violence to the fifth amendment guaranty of indictment by grand jury and is inconsistent with the principles laid down by this Court in *Russell v. United States*, 369 U.S. 749 (1962).

In *Pipkin*, the defendant requested that the trial court read the Government's bill of particulars to the jury. The trial court refused and the Court of Appeals for the Fifth Circuit affirmed:

> His [defendant's] final point that where the court at the jury's request read the indictment to them, he should have read the bill of particulars also, is equally insubstantial. No case is cited which supports the contention. We think none can be found. The objective and purpose of a bill of particulars is not to supplement or in anywise change or affect the indictment as an indictment. It is to better apprise the defendant of what he is expected to meet. The jury did not ask for and would not have known what to do with the bill of particulars. No useful purpose could have been served by reading it to the jury. Indeed it would have been error to read it. 243 F.2d at 494.

A similar indication that the submission of a bill of particulars to the jury over defendant's objection constitutes prejudicial error is found in the opinion of the United States Court of Appeals for the Second Circuit in *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964). *See also Westry v. Commonwealth*, 206 Va. 508, 144 S.E.2d 427 (1965); *State v. Bickham*, 239 La. 1094, 121 So. 2d 207 (1960).

In the present case the prejudicial effect of the bill of particulars is magnified to constitutional dimensions by the deficiencies in the indictment. The facts reveal that

defendant Radetsky may very well have been tried and convicted on charges other than those contained in the grand jury's indictment. The patient treatment charts which were turned over to the grand jury pursuant to subpoena, almost without exception, indicate that Radetsky had given each and every drug which was listed on the request for payment forms. A comparison of the patient treatment charts with the request for payment forms merely suggested that, in addition to the drugs listed on the requests for payment, certain other drugs had also been given but had not been included on the request forms. The only way the grand jury could have concluded that Radetsky had *failed* to administer drugs listed on the request for payment forms would have been through testimony that the patient charts were inaccurate. No such testimony could have been presented to the grand jury. The only grand jury witnesses familiar with the office records were Burke, Largent and Griffin. They could not have discussed inaccuracies in the patient treatment charts, because, at the time of their testimony, those documents had not yet been subpoenaed and were not available to the grand jury. Thus, it is apparent that the grand jury's indictment as it relates to "services" is based *only* on an allegation that Radetsky did not list all drugs administered.

Apparently, sometime after the grand jury returned its indictment, the United States Attorney decided that the patient charts had been altered and that certain drugs had been added in order to make the charts conform with the requests for payment. He, therefore, concluded that Radetsky not only had failed to list all drugs given, but also had not administered certain drugs listed on the requests for payment. As a result, the bill of particulars alleged that Radetsky had both concealed drugs which had been given *and* had failed to give other drugs which were listed on the

request forms. Radetsky was tried on both of these theories when, in fact, the indictment was almost assuredly based solely on the former theory.

This case provides a graphic example of how the combination of a deficient indictment and a bill of particulars can produce the constitutional problems which this Court described in *Russell, supra*. Under the facts of this case, the Court of Appeals' determination that submission of the bill of particulars to the jury was harmless error cannot withstand constitutional scrutiny.

3. Whether the right to be free from compulsory self-incrimination applies to patient treatment records used by a doctor who has formed a professional medical corporation is a question of substantial constitutional importance which has not been previously considered by this Court. The records introduced into evidence over defendant's objection were used by Dr. Radetsky solely for the purpose of providing medical care for his patients. If the defendant had not formed a professional corporation, these patient records would have been personal records held by the defendant in a personal capacity. Under the rationale of *Boyd v. United States*, 116 U.S. 616 (1886), their introduction into evidence over defendant's objection clearly would have violated the fifth amendment. Whether the existence of a professional corporation alters the capacity in which these records were held depends upon the character of a professional medical corporation as defined by the laws of the state of incorporation. *See, e.g., United States v. Empey*, 406 F.2d 157 (10th Cir. 1969).

Under the Colorado Medical Practice Act,[12] the obligation of a doctor to provide treatment for his patient cannot

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[12]COLO. REV. STAT. ANN. 1973, 12-36-134 [formerly COLO. REV. STAT. ANN. 1963, 91-3-37, as amended (Perm. Cum. Supp. 1969)].

be a corporate responsibility. A corporation formed under this Act is not a corporation for all purposes. For financial purposes there is no doubt that a professional medical corporation is quite similar to a corporation formed under the general corporation statute. On the other hand, the relationship between doctor and patient remains a personal one in which the corporation plays no part. Records kept concerning treatment given, which do not contain financial information, must, therefore, be considered personal records held by the doctor in his personal capacity.

Professional medical and legal corporations are in widespread use throughout the United States. As a result, the constitutional problem presented here will continue to arise until this Court renders a definitive decision on the subject.[13]

4. The admonition of secrecy to witnesses before a grand jury in violation of Rule 6(e) of the Federal Rules of Criminal Procedure presents a serious threat to the proper administration of justice in the federal courts and to the concept of fair trial embodied in the due process clause of the fifth amendment. The Government, of course, has no obligation to aid a criminal defendant in the preparation of his case or to provide the defendant with information other than that required by the rules of discovery. There is, however, a constitutional obligation upon the Government to refrain from interfering with the defendant's ability to

[13]*Bellis v. United States*, 417 U.S. 85 (1974) does not resolve the question presented in this case. *Bellis* held that *financial records* of a professional corporation do not fall within the fifth amendment privilege. We agree that professional corporations are set up primarily for financial reasons, and, therefore, financial records are corporate documents. The question of whether other types of records prepared in connection with the personal relationship between a doctor and his patient or an attorney and his client fall within the protection of the fifth amendment was not discussed in *Bellis*.

investigate and prepare his case. The record in the present case establishes that Government inspired silence of grand jury witnesses severely hampered Dr. Radetsky's ability to adequately prepare his defense. The only other avenue by which the defendant could have obtained information withheld by these witnesses was through the grand jury transcripts. These were also denied to him until after the trial had begun.[14] The Court of Appeals' decision that Radetsky was not prejudiced by this Government inspired silence significantly erodes the constitutional guaranty of a fair trial and cannot be tolerated in the administration of the federal criminal justice system.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[14]It has been indicated that Government inspired silence gives rise to a particularized need for discovery of grand jury testimony. *See, e.g., United States v. Mitchell*, 372 F. Supp. 1239 (S.D.N.Y. 1973).

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUIS MARTIN RADETSKY, a/k/a L. M. RADETSKY, Defendant-Appellant.	)	No. 74-1484

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(District Court No. 73-CR-415)

Richard J. Spelts, Assistant United States Attorney, Denver, Colorado (James L. Treece, United States Attorney, Denver, Colorado, on the brief) for Plaintiff-Appellee

Bruce D. Pringle, Attorney, Denver, Colorado (James D. Clark, Clark, Martin and Pringle, Denver, Colorado, on the brief) for Defendant-Appellant

Before LEWIS, Chief Judge, and HOLLOWAY and BARRETT, Circuit Judges

HOLLOWAY, Circuit Judge

Defendant-Appellant Radetsky, a Colorado osteopathic physician, was indicted on 41 substantive counts under 18 USCA §§ 1001 and 2, and a conspiracy count under 18 USCA § 371, in connection with the submission of allegedly false medicare claims. Three of the substantive counts were dismissed by the Government prior to trial. The trial court dismissed the conspiracy count at the close of the evidence. The defendant was found not guilty by the jury on six substantive counts, and convicted on guilty verdicts on 32 of the remaining substantive counts. The court imposed a $1,500 fine on each of these 32 counts, or a total fine of $48,000, and defendant appeals.

Defendant argues numerous propositions for reversal. We find it necessary to discuss several of the principal appellate contentions at some length concerning: (1) whether the indictment was defective, among other things failing to meet required standards of specificity and failing to allege particular statements charged to have been false so that the grand jury's charges were not known, with trial and convictions occurring on charges specified only in the bill of particulars in violation of defendant's Fifth Amendment right that he not be held to answer "unless on a presentment or indictment of a Grand Jury;" (2) whether it was error for the bill of particulars, together with the indictment, to be sent with the jury for its deliberations;

(3) whether prosecution was proper under 18 USCA § 1001, a general felony statute, instead of under 42 USCA § 408, a more recent and specific misdemeanor statute, covering false statements made for use in determining medicare payments, among other things; (4) whether there was error in admitting over defendant's Fifth Amendment objection, and in not ordering the return of, records found to have been subpoenaed from a professional corporation where defendant practiced, but said to have been his personal papers and records; (5) whether the trial court erred in denying inspection of grand jury testimony of Government witnesses; (6) whether there was error in denying challenges to jurors who had read pretrial publicity material concerning defendant; (7) whether the trial court erred in the exclusion and admission of evidence; and (8) whether certain counts contained allegations of false statements which the court should have held immaterial as a matter of law, and whether the trial court, in any event, erred in submitting the issue of materiality to the jury without a proper instruction.

We will treat the facts in discussing the appellate issues before us.

I

The Fifth Amendment guaranty concerning indictment by grand jury and the sufficiency of the indictment

The Fifth Amendment provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. .

The related provision of the Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . .

The importance of the historic guaranty of the provision for indictment by a grand jury has long been recognized. In Ex Parte Bain, 121 U.S. 1, 11, the opinion recited this portion of a grand jury charge by Justice Field:

> . . . Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also

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[1] If presentment ever were an alternative to indictment, this has not been the case since adoption of the Federal Rules of Criminal Procedure, which make no provision for prosecution by presentment. Gaither v. United States, 413 F.2d 1061, 1065, n. 1 (D.C.Cir.).

> as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

See Russell v. United States, 369 U.S. 749, 771; Stirone v. United States, 361 U.S. 212, 218; see also Wood v. Georgia, 370 U.S. 375, 390.

It is this fundamental guaranty to be tried only on charges made by a grand jury that mainly concerns us. The substantial safeguard of the guaranty to those charged with serious crimes cannot be eradicated under the claim that variations are mere technical departures from the rules. Smith v. United States, 360 U. S. 1, 9. And in honoring the guaranty we must be mindful of its corollary that a federal indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. Russell, supra at 770-71. "Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . ." Ex parte Bain, supra at 13.[2]

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[2] While the significance of the protection of the indictment process has been emphasized, it has not been held applicable to the States as a due process principle. See Beck v. Washington, 369 U.S. 541, 545.

The purposes and requirements for the sufficiency of indictments have been variously stated, but the essentials are clear. First, the indictment must contain the elements of the offense and sufficiently apprise the defendant of what he must be prepared to meet; second, it must be such as to show to what extent he may plead a former acquittal or conviction as a bar to further prosecution for the same cause. Russell, supra at 763-64; United States v. Hess, 124 U.S. 483,487. And a purpose corollary to the first is that the indictment inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. Russell, supra at 768; United States v. Hess, supra at 487. Furthermore,and of paramount importance, a sufficient indictment is required to implement the Fifth Amendment guaranty and make clear the charges so as to limit a defendant's jeopardy to offenses charged by a group of his fellow citizens, and to avoid his conviction on facts not found, or perhaps not even presented to, the grand jury that indicted him. Russell, supra at 770-71; see Stirone v. United States, 361 U.S. 212, 217-18; Gaither v. United States, 413 F.2d 1061, 1066-67 (D.C.Cir).

Defendant argues that the present indictment is void and fails to perform any of the four functions discussed above, stressing most heavily that the impermissible vagueness of the indictment infringed on his Fifth Amendment guaranty that he be tried only on charges made by the grand jury and not on charges later

determined by the prosecutor to be used as grounds for trial and conviction. (Opening Brief of Defendant-Appellant, 22-27). More specifically the indictment is challenged for lack of specificity in failing to identify specific false statements as to the "services" or "charges" referred to in the requests of medicare payments,[3] and claimed to have been the subject of knowing and wilful material concealment and covering up by trick, scheme and device.

We are not persuaded that the defendant has raised a serious problem here pertaining to any of the first three functions of the indictment—those relating to notice, double jeopardy, and sufficiency in law of the facts alleged to support a conviction. A detailed bill of particulars was furnished to the defendant four months prior to trial, giving adequate specifics as to the particulars of the Government's proof. While a bill of particulars cannot save an invalid indictment, Russell, supra at 770, it can serve to give adequate notice for trial preparation in these circumstances. See Gaither v. United States, supra, 413 F.2d at 1067. Likewise the bill of particulars, together with the record evidence of exhibits and testimony, affords protection against double jeopardy since the whole record is available to avoid being placed twice in jeopardy for the same offense.

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[3] Form SSA-1490, "Request For Medicare Payment" is the form submitted by physicians and individuals as claims for medicare payments. Portions of such requests pertaining to counts 34 and 36 are reproduced in the Appendix to this opinion, part c.

Tritt v. United States, 421 F.2d 928, 930 (10th Cir.). And we are satisfied that the indictment, set out in part in the appendix to this opinion, adequately alleged the facts in order to determine that an offense was stated sufficiently to support a conviction if one should be had. Russell, supra at 768.

The argument based on the Fifth Amendment guaranty of trial only on an indictment of a grand jury raises serious questions. They must be carefully considered by focusing on the indictment in the context of the factual circumstances surrounding the requests for payment and the allegedly false statements and representations relied on by the Government, keeping in mind the important function of the constitutional guaranty and its historic protections.

We turn to the indictment and the particulars of two counts—count 34 and count 36—which illustrate the problem concerning this indictment. In part the indictment charges that the defendants[4]

> ...did unlawfully, knowingly and wilfully conceal and cover up by trick, scheme, and device material facts, and make and cause to be made false statements and representations of material facts, all for the purpose of causing payments to be made under the provisions

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[4] Another defendant, Standefer, was indicted also but her trial was severed from that of defendant Radetsky.

The indictment is more fully set forth in the appendix to this opinion, along with related parts of the bill of particulars and some relevant exhibits.

of Title XVIII of said Act, in that RADETSKY and STANDEFER did submit and cause to be submitted to Colorado Medical Service, Inc., aka Colorado Blue Shield, documents designated as Form SSA-1490, otherwise known as Request for Medicare Payment—Medical Insurance Benefits—Social Security Act (hereinafter in this indictment referred to as Request for Payment), to secure payment under Part B of Title XVIII of said Act, for medical services allegedly rendered in Colorado to the patients and for the periods of time stated hereinbelow, which Requests for Payment purport to show the date of each service, fully describe the medical services rendered for each date given, the charges, and the amount paid by the patients against such charges, WHEREAS, in truth and in fact, as RADETSKY and STANDEFER then knew, (1) the patients actually received medical services less frequently than stated on the Requests for Payment (dates in parenthesis hereinbelow indicate those when the patient did not receive any medical service), (2) the Requests for Payment did not fully, truly and accurately describe the medical procedures and services for each date given as required (indicated hereinbelow by the word "services"). (3) the Requests for Payment did not disclose that the amounts shown as charges for services were at a higher rate and more than the customary charges of South Denver Clinic, Inc. to either medicare or non-medicare patients for the same service (indicated hereinbelow by the word "charges", and (4) the amounts shown on the Requests for Payment as already paid by the patients against such charges were inflated (indicated hereinbelow by the words "amounts paid":

COUNT	DATE OF CLAIM	TIME COVERED BY CLAIM	NAME OF PATIENT	MATERIAL FACTS
			* * *	
34	8-19-70	5-1-70 to 8-7-70	BREYMAIER	Services, charges, amount paid.
			* * *	
36	6-3-70	1-19-70 to 5-25-70	GLENN	Charges.
			* * *	

ALL OF THE FOREGOING COUNTS 1 THROUGH 41 in violation of Sections 1001 and 2, Title 18, United States Code. (Emphasis added)

As stated, defendant challenges the failure of the indictment to allege particulars in connection with the "services" and "charges" claimed to have been misstated, underlined items 2 and 3 in the body of the quoted portion of the indictment. Defendant says that because of the multiplicity of "services" and "charges" covered by each claim form, there is absolutely no way to tell whether the charges and services the prosecutor may list in the bill of particulars are those relied on by the grand jury as the basis for its charges. Thus, he argues, the Fifth Amendment guaranty is violated, relying, inter alia, on Russell and Lowenburg v. United States, 156 F.2d 22 (10th Cir.).

It is true that the requests for payment alleged in the indictment cover "services" and "charges" including numerous items, in some instances spanning up to 5 1/2 months and 58 different charges for 58 items of service. Moreover, the Government's bill of particulars shows that while all items on some requests for payment were challenged in several instances, in many instances not all the items were challenged as falsifications. For example, on Exhibit 36-A only 10 out of 40 items were challenged as false, whereas on Exhibit 34-A all 28 items were challenged.[5] And since

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[5] In connection with counts 34 and 36, the extent of the numerous items covered by the requests for payments may be seen by examining those documents. Pertinent portions of them are also reproduced in part c of the Appendix.

(Fn. 5 continued)

the indictment's allegations are in somewhat general terms concerning falsification of "services" and "charges," it can be argued that the Government was free under this indictment to choose to introduce proof on any of numerous items. See Lowenburg v. United States, 156 F.2d 22, 23 (10th Cir.); Van Liew v. United States, 321 F.2d 664, 672 (5th Cir.).

We must agree that this question is difficult and close, in view of the requirements of the Fifth Amendment guaranty, as applied in Stirone, in Russell and in similar cases. There are, however, these specifics laid out in this indictment: it identifies each of the basic documents—the requests for payment—that are relied on as containing the false statements. Their dates and the single individual patients involved are set out, together with the period of time covered by each request for payment. The four types

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(Fn. 5 continued):

In part b of the Appendix related portions of the bill of particulars are also reproduced. By comparison of the bill of particulars with the related request for payment, it is apparent that on count 36 the Government was challenging only some items within the "charges" covered by the request for payment (Exhibit 36-A). This is shown also by paragraph F of the conspiracy count (count 42) which alleged that the concealment and false statements, etc., were interspersed with legitimate services rendered (a judgment of acquittal was entered on this count by the court at the close of the evidence, making that count moot).

Since the indictment itself, see part a of the Appendix, alleged misstatements characterized merely as "services" and "charges," the defendant argues there was an impermissible vagueness permitting the prosecutor to challenge items without their having been designated by the grand jury itself.

of concealment and falsifications charged are specified—medical services not rendered, by date; medical procedures and services not fully, truly and accurately described ("services"); charges being at a higher rate and more than customary for the same service (charges); and the amounts paid, allegedly inflated above amounts already paid by the patients.

In the circumstances before us we feel the indictment adequately laid out the grand jury's charges and the general factual circumstances underlying them. See United States v. Haskins, No. 74-1691, 9th Cir. (October 23, 1974,unpublished); United States v. Kones, No. 74 Cr. 672-LFM, S.D.N.Y. (August 14, 1974, unpublished). The indictment set forth the essential facts and the nature of the offenses charged and further details fall in the category of evidence on which the case would rest, which the indictment is not obliged to state. See Mims v. United States, 332 F.2d 944, 946 (10th Cir.); Flying Eagle Publications, Inc. v. United States, 273 F.2d 799, 802 (1st Cir.). And we feel this is not a case where the grand jury may have had a concept of the scheme essentially different from that relied on by the Government before the trial jury, as in United States v. Curtis, 506 F.2d 985, 989 (10th Cir.). See also Stirone v. United States, 361 U.S. 212, 217-18. While the question is serious and not free from doubt, we are persuaded that the indictment met the essential demands of the constitutional guaranty as staked out by the Supreme Court.

Defendant further asserts that evidence before the grand jury was insufficient to support the indictment; that the first grand jury declined to indict; and that hearsay and illegally held evidence were used before the second grand jury, relying on United States v. Leibowitz, 420 F.2d 39 (2d Cir.), and similar cases. The argument concerning the first grand jury is irrelevant. Cf. United States v. Kysar, 459 F.2d 422, 423 (10th Cir.). And it is clear that an indictment valid on its face — as we hold this to be — is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. Costello v. United States, 350 U.S. 359, 363; see also United States v. Calandra, 414 U.S. 388, 344-45; United States v. Addington, 471 F.2d 560, 568 (10th Cir.); United States v. Kysar, 459 F.2d 422, 424 (10th Cir.).[6]

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[6] A further attack on the indictment as improperly charging an offense under 18 USCA §§ 1001 and 2 instead of under 42 USCA § 408 is held to lack merit in Part III, infra.

II

The bill of particulars

Defendant argues that there was prejudicial error in submission of the bill of particulars, along with the indictment, to the trial jury for use in its deliberations at the request of the Government and over the defendant's objections. The argument follows from that made concerning the Fifth Amendment guaranty, already discussed, being specified in three points: that since the defendant could only be held to answer the grand jury's indictment, submission of the bill of particulars to the trial jury along with the indictment infringed on his rights under the constitutional guaranty; that the bill of particulars could only confuse the jury, since its purpose and use by the jurors were not explained by the instructions and the bill of particulars itself did not contain or explain the elements of the offenses; and that it was unfair to give the jury a written summary of the prosecution's case, which the defendant could not do in his behalf.

We must agree that submission of the bill of particulars to a trial jury is undesirable. The authority relied on by the Government, Shayne v. United States, 255 F.2d 739 (9th Cir.), cert. denied, 358 U.S. 823, is not persuasive. On appeal the defendants there argued that it was error to send the indictment to the jury without a bill of particulars, this resulting in eliminating

others as conspirators except the two appellants. The court merely said it was a matter of discretion whether the bill of particulars should be sent in, and that the decision not to do so was not error. Id. at 743. The more difficult problem here was not involved.

On the other hand we do not agree that cases primarily relied on by the defendant here dictate a reversal. In United States v. Borelli, 336 F.2d 376, 393 (2d Cir.), the court was reversing for other fundamental error and noted some further points, including a defense argument that the bill of particulars should not have been sent to the jury. The court said it should not have been sent to the jurors in the absence of a request from them; that the indictment makes the accusation; and that the submission of the bill of particulars was likely to be confusing, even with the instruction that it was not evidence. Pipkin v. United States, 243 F.2d 491, 494 (5th Cir.) merely held that the trial court did not err in refusing to read a bill of particulars to the jurors when complying with their request to have the indictment read to them. The court said that it would have been error to read the bill of particulars, as the jury would not have known what to do with it. We feel the cases did not deal with a situation close to ours and they do not convince us that reversible error occurred here.

As mentioned, we are not persuaded to approve the reading or sending in of a bill of particulars to a trial jury,over a defense objection, as was clearly made here. It does involve the potential of confusion with the grand jury's charges in the indictment and thus touches the sensitive area of the constitutional guaranty. This point is supported to some degree by a statement of the prosecuting attorney that if the bill of particulars was not sent in, the jury might well convict on items in the requests for payments not even challenged by the Government.[7] The trial court's statement of its ruling to send in the bill of particulars lends some further support to the defendant's contention.[8]

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[7] In his argument for sending in the bill of particulars the prosecuting attorney stated in part (Tr. Vol. XVII,1174-75):

> My concern is that if we don't send in the Bill of Particulars, the jury is not going -- they may well convict on one of the items listed on the request for Payment which hasn't even been challenged by the United States, and I think it would all be kind of a nullity in the process.

[8] The trial court stated, id. at 1175:

> THE COURT: Well, the Court has given some thought to the Bill of Particulars since yesterday afternoon. I have come to the conclusion that in view of the multicharges within the various Counts, that it's the only sensible thing to do, and the Court will do it, because it appears to the Court that a Bill of Particulars of this nature and in this type of a case is almost a necessity if the jury is going to return an intelligent verdict.

Moreover, the submission of a bill of particulars to the trial jury does give some advantage to the Government as a written summary re-emphasizing the prosecution's case.[9]

We feel, however, that reversible error is not demonstrated by the defendant. There were careful instructions by the trial court concerning both the indictment and the bill of particulars, and we read the instructions as a whole as distinguishing adequately between the indictment as a statement of the charges and the bill of particulars as specifying with more particularity the basis of the charges.[10] The instructions were clear that

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[9] We are mindful of cases holding that no prejudicial error occurred by permitting a trial jury to view summary exhibits such as blackboards, not themselves in evidence, which listed items of proof in evidence. E.g., United States v. Downen, 496 F.2d 314 (10th Cir.), cert. denied, 419 U.S. 897 (1974). We are not persuaded to hold that such cases support reading or submitting the prosecution's bill of particulars to a trial jury.

[10] In the opening portions of the charge the court referred three times to the indictment as making the charges (Tr. Vol.XVII, 1271-72). Later the court instructed in part (Id. at 1275):

> You will have with you in the jury room a copy of the indictment and a copy of the bill of particulars filed by the government which specifies with more particularity than the indictment, the basis of the charges in the indictment.
>
> Now, these documents are not evidence of any kind against the accused, and they do not create any presumption or permit any inference of guilt. They are nothing more than the formal method of accusing the defendant of the charges against him and advising him of the particularities of those charges.

(Fn.10 continued)

the indictment and the bill of particulars were not evidence. Moreover we do not believe that the bill of particulars amounted to a prejudicially unfair advantage for the prosecution. The trial exhibits were grouped in numbers correlating to the numbered counts of the indictment and the numbered exhibits, together with the related testimony, presented the essence of the Government's proof in an organized pattern. And, as we have said, we feel the indictment itself had adequately set forth the essential facts and the nature of the offenses charged.

While we conclude that the rule should be against giving the bill of particulars to a trial jury over a defense objection, we cannot agree that prejudicial error occurred here.

(Fn. 10 continued):

Later the court instructed in part (Id. at 1286):

> Now the exhibits, together with a copy of the indictment and a copy of the bill of particulars, will be furnished to you in the jury room.
>
> The exhibits are there for your use, and let me again remind you that the indictment and bill of particulars are not evidence. They are merely the written charges against the defendant together with certain specifics about the charges.

III

The objection to prosecution under 18 USCA § 1001 instead of under 42 USCA § 408

Defendant attacks the indictment on the further ground that it proceeds under 18 USCA § 1001 instead of under 42 USCA § 408.[11] The argument is that § 408 is a later, more specific statute; that it deals directly with false statements in connection with medicare claims; that the statutes are in conflict as to

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[11] The relevant statutory provisions appear in 18 USCA § 1001 and 42 USCA § 408(b) and (c), which provide in turn:

> § 1001. Statements or entries generally
>
> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat.749.
>
> * * *
>
> § 408. Penalties
>
> Whoever—
>
> * * *
>
> (b) makes or causes to be made any false statement or representation of a material fact in any application for any payment or for a disability determination under this subchapter; or
>
> (c) at any time makes or causes to be made any false statement or representation of a material fact for use in determining rights to payment under this subchapter;
>
> * * *
>
> shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

penalties and a § 408 violation is expressly termed a misdemeanor only; and that the more lenient statute should apply for all these reasons under settled rules of construction.

We must disagree. It is true that in construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty. United States v. Yuginovich, 256 U.S. 450, 463. And there are acts directly involved here — false written statements for medicare payment — that come under both penal statutes, although § 1001 is broader and deals with one who conceals or covers up by trick, scheme, or device a material fact as is also alleged in the indictment. See Cohen v. United States, 201 F.2d 386, 393 (9th Cir.). Section 408 is part of a misdemeanor statute with penalties and consequences significantly less harsh than those under the older felony statute with its more general provisions.

We feel nevertheless that the statutory provisions reveal no intent that 18 USCA § 1001 was barred from application here by the enactment of 42 USCA § 408. There is no indication of an intent to make the later act a substitute for any part of the earlier statute. United States v. Gilliland, 312 U.S. 86, 96; see Posadas v. National City Bank, 296 U. S. 497, 503. There is no controlling significance in the difference in the penalities

and no repugnancy in subject matter of the two statutes. Gilliland, supra at 95. And there is no straightforward or direct rejection of the prior statute. See Friends of the Earth v. Armstrong, 485 F.2d 1, 9 (10th Cir., en banc), cert. denied, 414 U.S. 1171 (1974).

We are persuaded to follow the holdings in United States v. Chakmakis, 449 F.2d 315, 316 (5th Cir.), and United States v. Matanky, 346 F.Supp. 116(C.D.Cal.), aff'd,482 F.2d 1319 (9th Cir.), cert. denied, 414 U.S.1039 (1973), and conclude that prosecution under 18 USCA § 1001 was not improper.

IV

The Fifth Amendment self-incrimination objection to admission of exhibits from defendant's clinic

Defendant contends that error occurred in denial of the motion to suppress records subpoenaed by the first grand jury from the South Denver Clinic where defendant practiced. He says they were his personal records of treatment of patients; that the existence of the professional corporation, of which he was president and sole shareholder[12] at the time of the alleged offenses, makes inapplicable the rule that corporate records are not protected by the Fifth Amendment privilege against self-incrimination; and that the court erred in not ordering return of the records to defendant or the South Denver Clinic.

An original and a renewed motion to suppress were heard and denied by the trial court. Our record contains the argument on the renewed motion, raising in essence the points outlined above and brief statements on the motion for return of the records (Tr. Vol. I, 10-21). It also contains the rulings denying the motions (Id. at 20-21). While we have no evidentiary record

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12 At trial the defendant testified that he and his wife were the only stockholders of the corporation and that he was i president (Tr. XIII, 928).

concerning the motions as such, the facts which we feel dispositive are shown by the trial record.

The South Denver Clinic was organized in 1969 as a professional corporation under Colorado law. See C.R.S. 1973, 12-36-134. The defendant testified at trial that he was president and that he and his wife were the only stockholders in 1970 and 1971. There were two doctors, the defendant and Dr. Griffin, and three regular clinic employees. The defendant said the patients were considered those of the individual doctors; however, when asked about money received from patients Dr. Griffin brought in, or medicare payments on their behalf, defendant said it went to the clinic (Tr. Vol. XIII, 928-32). The statements to the patients were on forms showing "South Denver Clinic," and also the names of the two doctors. Of the few checks in evidence, some were payable to defendant and some to the Clinic, but all were deposited to the credit of the Clinic.

The record exhibits in question consist of the yellow patients' charts; blue slips showing the test or service rendered, and the charge for it; punched business machine accounting cards showing dates of visits by patients, the doctor, the service, charges and credits; and the day sheets on all patients patronizing the clinic, showing their names and charges to them.

The defendant said that the records, "the yellow charts and so on. . ." were the property of the corporation, but were under his custody and control.[13] The defendant described the yellow sheets as a nurse's record, not a doctor's record.

We cannot agree that any error by the trial court is demonstrated. The professional corporation was organized as an independent institutional entity for the continuing conduct of the medical practice of the clinic. Bellis v. United States, 417 U.S. 85, 95-97. The records were not treated as being held by the doctors individually but were held in a representative capacity for the clinic. Id. at 97; Matter of Berry, 521 F.2d 179, 183 (10th Cir.), cert. denied, 44 U.S.L.W. 3264 (11/4/75). They were not possessed as private property which the Fifth Amendment protects.[14] Matter of Berry, supra at 183.

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13 The "yellow charts" are the patients' records showing diagnosis, treatment, dates of visits and findings, and listing medications for the patients covered by the 41 substantive counts. They were attached as exhibits with the requests for payments and other exhibits in groups correlating to each patient covered by the substantive counts

14 The confidentiality arising out of the doctor-patient relationship is relied on by the defendant. He refers to the provision in the professional corporation statute that it shall not be deemed to modify the physician-patient privilege. See C.R.S. 1973, 12-36-134 (5). However, the Government points out that the medicare patients made a waiver on the request for payment forms. This is a broad waiver to the Social Security Administration or its intermediaries or carriers for the furnishing of information about the patient. Under State law the patient could waive this privilege. Kelly v. Holmes, 470 P.2d 590, 592 (Colo. Ct. App.).

Moreover, the argument as to return of the documents is untenable since making available copies of the documents was accepted as sufficient, and the originals were properly subject to retention for trial, which was the intent of the court's order. See Application of Bendix Aviation Corp., 58 F.Supp. 953, 954 (S.D.N.Y.) (Tr. Vol. XIX, 57).

V

The denial of pretrial access to grand jury transcripts

Defendant contends there was error by the trial court in denying motions to inspect grand jury testimony of Government witnesses before trial; that the Jencks Act as amended in 1970, 18 USCA §3500, does not bar pretrial discovery of such testimony; that under the test of balancing the interests in protecting the grand jury testimony, or under the test of a showing of a particularized need, he met the requirements for being furnished such aids; and that his need was increased because of an improper admonition of secrecy to witnesses by Government counsel at the grand jury proceeding in violation of Rule 6(e), F.R. Crim.P.[15]

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15 The admonition by Government counsel to Dr. Griffin, a principal Grovernment witness, was as follows (Supp. Vol.III,89):

> [GOVERNMENT COUNSEL] At this time, Dr. Griffin, it is my duty to advise you that the Grand Jury proceedings are confidential by court order. That the fact that you have been here, the questions which were asked, and the answers which were given are not to be discussed with anyone, and if you feel the need to do so, you should first seek the permission of U.S. District Judge through your attorney, Mr. Creamer.
>
> THE WITNESS: I understand that, sir.
>
> [GOVERNMENT COUNSEL] The matters remain confidential, and I would ask at this time, Mr. Foreman, that the witness be instructed that his subpoena continues in effect, and he is to report back to the Grand Jury in March at the date notified by the United States Attorney.

We must agree the admonition to the witness is contrary to the provisions of Rule 6(e) that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule."[16] No provision in the rule applied to support the admonition. See In re Langswager, 392 F.Supp. 783, 788 (N.D.Ill.). However, we agree with the Government that no prejudice was shown in connection with the admonition or the trial court's denial of the transcripts.

Defendant argues that key Government witnesses flatly refused to discuss any aspect of their grand jury testimony with defendant's attorney. We are referred to testimony of Dr. Griffin in which he admitted refusing to talk to a representative from defense counsel's office and that he, Griffin, was not willing to talk about the case (Tr. Vol. XII, 769-70). Dr. Griffin was a key Government witness and did give damaging testimony against defendant. And we assume it would have been desirable and advantageous that defendant know the details of what was to come in advance. Nevertheless, the transcript of his grand jury testimony was made available to defense counsel before Dr. Griffin commenced his direct testimony. It was available during

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16 The Government advises us by its brief that the practice of giving such admonitions to witnesses has since been discontinued in the District of Colorado (Brief of Appellee, 53).

direct testimony and a noon recess which intervened before cross-examination.

No reference is made to any specific prejudice to defendant from not having the transcripts earlier. Regardless of whether the Jencks Act provisions or the particularized need standard applies, see United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877; United States v. Tager, 481 F.2d 97, 100 (10th Cir.), cert. denied, 415 U.S. 914 (1974), we are satisfied that any error was harmless and not prejudicial.[17] Defendant's position remains in effect a general claim that it was error to deny him the transcripts because they were needed for the defense, and this is not enough. United States v. Addington, 471 F.2d 560, 569 (10th Cir.).

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17 Under the particularized need standard it has been indicated that Government inspired silence might premise a showing of need for a transcript, see United States v. Mitchell, 372 F.Supp. 1239, 1258 (D.D.C.), but we need not decide the question since we feel there was no prejudice to defendant.

VI

The pretrial publicity and denial of challenges to jurors

Defendant urges reversal on the ground of pretrial publicity and the denial of challenges for cause to jurors. He says that there were several unfavorable articles about him in the Denver papers, and prejudicial television coverage; that misleading stories in the media were caused by statements of Government counsel; that five potential jurors replied they had read one or more articles concerning defendant, and that challenges for cause were erroneously denied.

There was considerable unfavorable publicity concerning defendant, and several jurors had read some of the articles. Nevertheless, the exposure of jurors to pretrial publicity does not compel their disqualification. Beck v. Washington, 369 U.S. 541, 557; Welch v. United States, 371 F.2d 287, 292 (10th Cir.), cert. denied, 385 U.S. 957. In United States v. Smaldone, 485 U.S. 1333, 1346 (10th Cir.), cert. denied, 416 U.S. 936 (1974), the remedial step taken was to excuse all jurors who had knowledge of the publicity, but that remedy is not mandatory. Here the trial judge carefully questioned all potential jurors concerning their state of mind. He asked additional questions of those who acknowledged they had read or heard the pretrial

publicity, and ascertained whether they could serve as fair and impartial jurors, having read the material (E.g., Tr. Vol. III, 9-10, 27).

We are satisfied the procedure met the standards for a fair trial. See Beck v. Washington, supra at 557; Irwin v. Dowd, 366 U.S. 717, 723; Welch v. United States, supra at 292. And we cannot say the pretrial publicity was so intensive or that examination of the entire panel revealed such prejudice that a court could not believe the jurors' answers and would be compelled to find bias or preformed opinions as a matter of law. Beck v. Washington, supra at 557.

VII

Claims of error in the exclusion and admission of evidence

First, defendant claims error in rejection of offers of proof from several patients who would have testified that defendant on numerous occasions did not bill or charge them for his services. The offer covered patients able to pay and others unable to pay. It was argued to the trial judge that such evidence was relevant and admissible to show a lack of motive by defendant to commit the offenses; that it was to meet Government proof that defendant's actions were caused by pressure he felt with respect to overhead and salaries, and that he had to get the money to pay overhead and expenses (Tr. Vol. XIV, 986-88).

The court considered the generalized offer of proof and rejected it on the ground that it was irrelevant and that there would be no limit to the evidence that could be produced, if such testimony were admitted. We cannot say there was an abuse of discretion in the ruling on relevance and reasonable limits on proof. See United States v. Twilligear, 460 F.2d 79, 81 (10th Cir.). Insofar as the offer went to proof of defendant's character, we note that five character witnesses were allowed by the court, and no abuse on this score is shown.

Second, defendant claims error in exclusion of proof which would suggest that the defendant was a victim of discriminatory prosecution because of his earlier association with the Dita Beard Congressional investigation controversy. The proof

offered was testimony by defendant relating his role in the Congressional investigation, where he offered his professional opinion that Mrs. Beard was not able to appear before any committee, and that within days after public announcement of his opinion, his case was referred for prosecution. Defendant further offered to prove that the same thing happened to other doctors treating Mrs. Beard who expressed the same opinion of her inability to testify (Tr. Vol. XIII, 890-93).

The trial court sustained a Government objection to the offer, without stating reasons for the ruling. Without deciding whether such proof might be grounds for challenging criminal proceedings, see United States v. Falk, 479 F.2d 616, 619-622 (7th Cir.), we sustain the ruling due to the remoteness and insubstantial nature of the offer of proof against the presumption of good faith in the prosecution, id. at 620, and the impropriety of the offer of such proof, which should have been made as a pretrial motion, rather than during the jury trial of the general issue. Rule 12(b), F.R.Crim.P.; see United States v. Oaks, 508 F.2d 1403 (9th Cir.).

Third, defendant says there was error in the admissions of medicare bulletins, Plaintiff's Exhibits 45A, 45B and 45C. We find no error or abuse of discretion in their admission in view of the testimony by Dr. Griffin concerning defendants' handling of medicare bulletins generally at the clinic (Tr. Vol. XIV, 687-89).

VIII

The materiality issue

At trial and on appeal one of the defendant's main arguments is that the issue of materiality of the alleged misrepresentations on the requests for payment should not have been submitted to the jury; that as to some 25 counts, part or all of the items of alleged misrepresentation were related to several drugs which the proof clearly showed to be noncompensable under established guidelines used by the medicare payment agency in Denver (Colorado Blue Cross-Blue Shield); that since the statements related only to such non-compensable drugs, they were incapable of inducing payments and were not material as a matter of law. Thus, it is argued, the convictions on these counts cannot stand.

The governing principles are clear. Materiality of the alleged misstatements is an essential element of offenses defined by 18 USCA § 1001. Gonzales v. United States, 286 F.2d 118, 120 (10th Cir.), cert. denied, 365 U.S. 878 (1961). The indictment here alleged that defendant's concealments, false statements and the like were of "material facts." The trial court recognized materiality as an essential element of the offenses and so charged the jury. There must be sufficient Government proof under the standard applied in criminal cases that the alleged misstatement was material. See Poulos v. United States, 387 F.2d 4, 6 (10th Cir.).

The application of these principles to a statement requesting payment from the Government has been made clear in Bartlett and Company Grain v. United States, 353 F.2d 338(10th Cir.). That prosecution under 15 USCA § 714m was for making a false statement to influence action of the Commodity Credit Corporation. A statement that grain was unloaded at a Kansas warehouse was false. However, under documents governing authority for payment of the allowance sought, the court determined no payment was authorized unless grain was delivered "in store"; payment was not authorized if delivery was only "F.O.B. bin site." The Government proof was held to be clearly of the latter type of transaction, according to the record exhibits. And since payment was unauthorized if the grain had been unloaded in accordance with the representations in the statement, the misstatement proved was incapable of inducing payment by the CCC, and was therefore immaterial. Id. at 343.[17a]

It is this proposition that defendant relies on. He says the proof showed that the medicare payment agency guidelines excluded payment for the drugs involved in the 25 counts,

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17a

The statute involved in Bartlett concerned a false statement made "for the purpose of influencing in any way the action of [the CCC] or for purposes of obtaining for himself on another money on anything of value..." This is parallel to the test which applies under 18 USCA § 1001 on materiality — that the statement ". . .has a natural tendency to influence, or was capable of influencing, the decision of the tribunal.. ." Gonzales v. United States, supra, 286 F.2d at 122. This was the test stated in the trial court's charge (Tr. Vol. XVII, 1277).

in the circumstances shown. And since payment was not authorized, any misstatement could not induce payment and was immaterial as a matter of law.

We must agree with the substance of defendant's position. The facts about the 25 counts involved are not simple, but they may be summarized for our purposes.

Mr. Wells, an Assistant Vice President of Colorado Blue Cross-Blue Shield, testified for the Government. At the time in question he was Director of the Benefit Review Division (BRD) and it put out information on the compensability of drugs under medicare[18] (Tr. Vol. V, 131, et seq.). The BRD prepared a manual which followed the provisions of the medicare statute and regulations on compensability.[19] This written manual which

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The determination of compensability for a particular drug under Medicare is no simple matter. The detailed statutory scheme for Medicare, 42 USCA § 1395 et seq., provides generally for compensation for drugs if the drugs are listed in any of five standard pharmaceutical compendia, or are specifically approved for use by a committee of hospital medical staff furnishing such drugs. 42 USCA § 1395x(t). The statute excludes from coverage, however, drugs which can be self-administered. 42 USCA § 1395x(s)(2) (a) and (b). Federal regulations promulgated by the Social Security Administration exclude from coverage drugs used in immunization, where the drug is used for vaccination or innoculation not directly related to the treatment of an injury, 20 C.F.R. § 405.310(e), and also exclude drugs which are not reasonable and necessary for the diagnosis or treatment of illness or injury, 20 C.F.R. § 405.310(k).

19

Mr. Wells testified that the statutes and regulations establish four basic criteria determining compensability (Tr. Vol.V, 132-135). Basically, the criteria require: (a) the drug must be listed in one of five standard drug compendia; (b) the drug must be incapable of self-administration; (c) the drug may not be given as an immunization; and (d) the drug must be reasonable and necessary for the diagnosis and treatment of the patient's illness.

(Fn. 19 continued to next page)

was furnished to the processing division was introduced in evidence. Plaintiff's Exhibit 61.

The manual lists several hundred drugs. The notation "NB" was described by Mr. Wells as indicating "no benefit."[20] Defendant points out several drugs involved here carried the "no benefit" designation — Liparin, Thiosol, and Ethaverine (Spasmol), and we note Guiadin also. Claims relating to these drugs were involved in 12 counts.[21] When the motion for a directed verdict on this basis was made, the Government argued

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(Fn. 19 continued):

Since medicare claims are processed not by doctors, but by laymen, Colorado Blue Cross-Blue Shield prepared a manual and a list of injectable drugs to aid clerks in the processing division (Tr.Vol.V,132-135).This list of injectable drugs, Plaintiff's Exhibit 61, reduces criteria (a) and (b) to a checklist procedure. Also included in this manual are occasional cross references to drug guidelines which are attached to the drug list and which give some indication as to whether criteria (c) and (d) are satisfied in the administration of certain drugs.

20

Mr. Wells testified that drugs bearing the "NB" notation were not listed in the five compendia referred to by the statute and said they were not covered under any circumstance. He stated: "No, they are specifically excluded from coverage." (Tr. Vol. XII, 781) (emphasis added).

21

These twelve counts are counts 12, 13, 14, 22, 23, 24 25, 26, 30, 35, 38 and 40.

that other misstatements existed on the requests for payments, along with these items, and that since other items could support a conviction on the counts, the motion should be denied. The trial court agreed.

However, the presence of other material misstatements concerning a count cannot sustain a conviction in these circumstances. In submitting the case the noncompensable drug representations were not eliminated from the jury's consideration. Now, in reviewing the convictions on those 12 counts we cannot determine whether the jury may have relied on the immaterial misstatements concerning noncompensable drugs, which appear on the requests for payment before the jury. If in fact it was improper to consider any item of alleged misrepresentation, and that item could have been the basis for a general verdict of guilty on the count, the conviction cannot stand. See United States v. Dota, 482 F.2d 1005-1006 (10th Cir.), cert. denied, 414 U.S. 1071(1973). Thus the convictions on these twelve counts must be set aside.

The problem relating to Heparin is more involved. The "Drug Listing" manual, Plaintiff's Exhibit 61, did not exclude it from coverage. However, it placed strict conditions on compensability.[22] The conditions were ones that related in large part to

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Unlike Liparin, Thiosol, Ethaverine and Guiadin, Heparin and TBA (cortisone) are not designated "NB" in Plaintiff's Exhibit 61. The notation "Heparin Guideline" appears opposite Heparin in

(Fn. 22 continued to next page)

the diagnosis involved and the reasonableness of the use of the drug in the circumstances. The difficulty is that the requests for payment did not show diagnoses coming within the conditions for payment for Heparin. The Government proof on these counts

(Fn. 22 continued):

Plaintiff's Exhibit 61. The Heparin guideline appears at the back of Plaintiff's Exhibit 61 and reads:

> Exclude from coverage except for:
> phlebitis;
> impending myocardial infaction with hospitalization the same day;
> embolism-cerebral, pulmonary or peripheral with hospitalization

None of these diagnoses appear on any request for payment listing Heparin.

The defendant makes a similar argument with respect to TBA (cortisone). The notation "Steroid Guidelines" appears opposite TBA (cortisone) in Plaintiff's Exhibit 61. The Steroid guidelines are more complex. They specify that steroids may be given for certain diseases, including those appearing on the Request for Payment pertaining to count 8. For the diseases listed on the request for payment, steroids may only be given for periods of 2-3 weeks, and there must be a one month interval between the periods.

Five TBA injections are listed on the request for payment, Plaintiff's Exhibit 8-A. The injections are dated 2/9/71, 2/16/71, 2/19/71, 2/23/71 and 3/1/71. The defendant contends that the Medicare agent had no authority to pay for the TBA injections of 2/23/71 and 3/1/71, apparently viewing their dates as beyond the 2-3 week period beginning with the 2/9/71 injection, and not meeting the required one month interval. (See Appellant's Brief at 51, n.29). We reject this argument. By our calendar, the period from 2/9/71 through 3/1/71 is less than three weeks. Therefore, all five injections are compensable under the guidelines, the alleged false statements are material under Bartlett, and the conviction on count 8 can stand.

did not extend to showing any additional statements or diagnoses furnished by defendant, which would result in the compensability of claims for Heparin. Without more, the mere statement of a clain for Heparin was not capable of inducing payment, as required for materiality by Bartlett and Company Grain v. United States, supra, 353 F.2d at 343.[23]

The proof must be analyzed to see that there is sufficient evidence that the alleged misstatement was material. E.g., Poulos v. United States, 387 F.2d 4, 6 (10th Cir.). In reviewing the guilty verdicts we must determine, viewing the proof in the light most favorable to the Government, whether there is sufficient substantial proof, direct or circumstantial, together with reasonable inferences therefrom, from which a jury might find the defendant guilty beyond a reasonable doubt. United States v. Twilligear, 460 F.2d 79, 81-82 (10th Cir.). And Gonzales v. United States, supra, 286 F.2d 118, 120, makes it clear that materiality ". . . is an essential element of the offenses defined in Section 1001." In view of this requirement, and the state of the record, we must hold the proof was not sufficient to sustain the criminal convictions on these additional counts.[24]

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[23] We are mindful of the fact that actual loss to the Government need not be shown. See United States v. Godel, 361 F.2d 21,24 (4th Cir.), cert. denied, 385 U.S. 838 (1966). But the Bartlett requirement is clear on materiality and we must hold that here it was not sufficiently met to go to the jury as to the counts discussed in this Part VIII of the opinion.

[24] These additional counts are counts 9, 10, 16, 17, 18, 19, 27, 29, 31, 32, 33, 34, 39 and 41.

Accordingly the judgment is affirmed as to the six counts not involving the issue of materiality;[25] as to the remaining 26 counts,[26] the judgment is set aside, and the case is remanded for dismissal of the indictment as to said counts.

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25 These counts are: 7, 8, 11, 15, 28 and 36.

26 These counts are: 9, 10, 12, 13, 14, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 38, 39, 40 and 41.

The defendant challenged only 25 counts. We find no merit in his challenge to count 28. Although the defendant did not specifically challenge counts 16 and 17 as containing immaterial false statements, we find their position on the materiality problem indistinguishable as to the "charges" allegations of those counts, and we therefore reverse counts 16 and 17.

APPENDIX

a. The Indictment

In part the indictment states:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, v. LOUIS MARTIN RADETSKY, aka L. M. Radetsky, MARIE STANDEFER, Defendants.	CRIMINAL CASE NO. 73-CR-415 False Medicare Claims, 18 U.S.C. 1001 and 2; Conspiracy to Defraud the United States, 18 U.S.C. 371

COUNTS 1 THROUGH 41

The Grand Jury charges: * * *

D. That on or about the dates hereinbelow set forth, in the State and District of Colo., in a matter within the jurisdiction of said Administration, LOUIS MARTIN RADETSKY, aka L. M. Radetsky and MARIE STANDEFER, did unlawfully, knowingly and wilfully conceal and cover up by trick, scheme, and device material facts, and make and cause to be made false statements and representations of material facts, all for the purpose of causing payments to be made under the provisions of Title XVIII of said Act, in that RADETSKY and STANDEFER did submit and cause to be submitted to Colorado

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a/ The indictment refers to one Marie Standefer and one Richard E. Griffin, no charges being made against Griffin. The trial of defendant Radetsky was severed from that of Standefer, pursuant to a motion by the government.

Medical Service, Inc., aka Colorado Blue Shield, documents designated as Form SSA-1490, otherwise known as Request for Medicare Payment--Medical Insurance Benefits--Social Security Act (hereinafter in this indictment referred to as Request for Payment), to secure payment under Part B of Title XVIII of said Act, for medical services allegedly rendered in Colorado to the patients and for the periods of time stated hereinbelow, which Requests for Payment purport to show the date of each service, fully describe the medical services rendered for each date given, the charges, and the amount paid by the patients against such charges, WHEREAS, in truth and in fact, as RADETSKY and STANDEFER then knew, (1) the patients actually received medical services less frequently than stated on the Requests for Payment (dates in parenthesis hereinbelow indicate those when the patient did not receive any medical service), (2) the Requests for Payment did not fully, truly and accurately describe the medical procedures and services for each date given as required (indicated hereinbelow by the word "services"), (3) the Requests for Payment did not disclose that the amounts shown as charges for services were at a higher rate and more than the customary charges of South Denver Clinic, Inc. to either medicare or non-medicare patients for the same service (indicated hereinbelow by the word "charges"), and (4) the amounts shown on the Requests for Payment as already paid by the patients against such charges were inflated (indicated hereinbelow by the words "amount paid":

COUNT	DATE OF CLAIM	TIME COVERED BY CLAIM	NAME OF PATIENT	MATERIAL FACTS
			* * *	
7	6-29-71	4-10-71 to 6-22-71	CHARLES H. BRADY	House call on April (10); charges
8	4-28-71	2-9-71 to 3-1-71	GLADYS JOHNSON	Office call and treatment on Feb. (9); charges
9	5-27-70	1-9-70 to 5-15-70	PEARL H. FOLTZ	Services, charges.
10	3-3-71	9-11-70 to 12-31-70	PEARL H. FOLTZ	Office calls and treatment on Sep. (18), Oct. (2); services, charges.
11	7-21-71	1-15-71 to 7-2-71	PEARL H. FOLTZ	Services, charges.
12	5-27-70	1-9-70 to 5-15-70	EVA C. FISHER	Services, charges.
13	3-3-71	9-4-70 to 12-23-70	EVA C. FISHER	Office call and treatment on Sep. (11); services, charges.
14	7-14-71	1-8-71 to 6-25-71	EVA C FISHER	Services, charges.
15	5-25-70	1-2-70 to 5-1-70	CARL E. DAHLQUIST	Services, charges.
16	9-1-70	5-27-70 to 8-21-70	CARL E. DAHLQUIST	Services, charges.
17	1-20-71	8-28-70 to 12-18-70	CARL E. DAHLQUIST	Services, charges.

18	7-14-71	1-8-71 to 6-21-71	CARL E. DAHLQUIST	Services, charges.
19	12-8-71	7-9-71 to 11-26-71	CARL E. DAHLQUIST	Services, charges.
20	6-29-71	1-7-71 to 6-25-71	HENRY M. BOOK	Services, charges.
21	12-1-71	7-2-71 to 11-18-71	HENRY M BOOK	Services, charges.
22	4-15-70	2-12-70 to 3-26-70	CHARLES W. CLARK	Services, charges.
23	5-27-70	4-2-70 to 5-15-70	CHARLES W. CLARK	Services, charges.
24	8-19-70	5-22-70 to 8-14-70	CHARLES W. CLARK	Services, charges
25	1-27-71	8-21-70 to 12-31-70	CHARLES W. CLARK	Services, charges.
26	7-14-71	1-15-71 to 6-25-71	CHARLES W. CLARK	Services, charges.
27	12-8-71	7-9-71 to 11-19-71	CHARLES W. CLARK	Services, charges.
28	6-17-70	1-2-70 to 5-25-70	ALEDA J. SMITH	Charges, amount paid.
29	9-30-70	6-18-70 to 9-10-70	ALEDA J. SMITH	Services, charges, amounts paid.
30	6-9-71	1-21-71 to 6-3-71	ALEDA J SMITH	Services, charges, amount paid.

31	6-17-70	1-9-70 to 5-23-70	PHILLIP SOLOWAY	Services, charges, amount paid.
32	10-7-70	6-18-70 to 9-29-70	PHILLIP SOLOWAY	Services, charges, amount paid.
33	5-27-70	1-2-70 to 4-29-70	ESTHER D. BREYMAIER	Services, charges, amount paid.
34	8-19-70	5-1-70 to 8-7-70	ESTHER D. BREYMAIER	Services, charges, amount paid.
35	5-12-71	1-7-71 to 4-15-71	ELEANOR JOHNSON	Services, charges.
36	6-3-70	1-19-70 to 5-25-70	DORA GLENN	Charges.
37	11-4-70	9-4-70 to 10-30-70	CLARENCE HEFLIN	Charges.
38	4-28-71	1-4-71 to 4-12-71	LILIAN M. HUBBARD	Office call and treatment on Jan. (25); charges.
39	8-27-71	4-26-71 to 8-13-71	LILIAN M. HUBBARD	Charges.
40	6-17-70	1-8-70 to 6-16-70	GEORGE A. WHEELER	Services, charges.
41	6-23-71	1-7-71 to 6-10-71	GEORGE A. WHEELER	Charges.

ALL OF THE FOREGOING COUNTS 1 THROUGH 41 in violation of Sections 1001 and 2, Title 18, United States Code.

COUNT 42

The Grand Jury further charges:

A. The contents of paragraphs A, B, and C, of Counts 1 through 41, supra, are hereby incorporated herein by reference.

* * *

F. It was further a part of the conspiracy that in those instances where the charge on the Request for Payment was at a higher rate than the customary charge to the patient for the same service the addition would be of small amounts, e.g., $1.00 or $2.00 per service; that the concealment and cover-up of material facts as well as affirmative false statements and representations of material facts, as described in paragraph C, supra, would be interspersed with legitimate services rendered; all in an attempt to avoid detection.

. . .

b. The bill of particulars

The bill of particulars stated in part:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, v. LOUIS MARTIN RADETSKY, aka L. M. Radetsky, MARIE STANDEFER, Defendants.	CRIMINAL CASE NO. 73-CR-415 BILL OF PARTICULARS

The United States, by Richard J. Spelts, Assistant United States Attorney, submits this Bill of Particulars in accordance with the Court order of December 21, 1973. Information is supplied in two parts: I--Counts 1 through 41, and II--Count 42.

I.--COUNTS 1 THROUGH 41

Listed below for each count are the material facts which the defendants did unlawfully, knowingly and wilfully conceal and cover up by trick, scheme, and device, and make and cause to be made as false statements and representations. Drugs listed were in the form of an injection unless otherwise specified. South Denver Clinic, P. C., is referred to herein as the Clinic.

* * *

COUNT 34 (Breymaier)

(A) Services:

Date	Per Request for Payment	Per Clinic Records and/or Patient
5-1-70	Heparin and Mercuhydrin	Heparin and B-12
5-9-70	"	"
5-15-70	"	"
5-22-70	"	"
6-5-70	"	"
6-12-70	"	"
6-19-70	"	"
6-26-70	"	"
7-3-70	"	"
7-10-70	"	"
7-17-70	"	"
7-24-70	"	"
7-31-70	"	"
8-7-70	"	"

(B) Charges:

Per Request for Payment	Per Clinic Records and/or Patient
14 Office calls at $6 each; Injections (14 times) at $2 each time.	Office calls including injection: 6 at $6 each until 6-19-70, then 8 at $7 each.

(C) Amount Paid:

The request for payment, box 10 "Amount Paid," claims the patient had already paid $112, whereas the paitent paid less than this amount.

* * *

COUNT 36 (Glenn)

(A) Charges:

Per Request for Payment	Per Clinic Records and/or Patient
5 office calls at $6 each; Injections (5 times) at $2 each time; all until 2-2-70.	5 office calls including injection at $6 each until 2-2-70; thereafter $8 each as claimed on Request for Payment.

c. The requests for payment

Concerning count 34 (Breymaier). Plaintiff's Exhibit 34-A-1, the request for payment, read in part as follows:

Itemization of Account:

5-1-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
5-9-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
5-15-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
5-22-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
6-5-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
6-12-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
6-19-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
6-26-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
7-3-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
7-10-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
7-17-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
7-24-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
7-31-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
8-7-70	Office Call & Examination	6.00
	100 mg Heparin & 1cc Mercuhydrin injections	2.00
	Total charges from 4-29-70 thru 8-7-70	112.00
	Paid on Account	112.00
	Balance due	-0-

Concerning count 36 (Glenn), Plaintiff's Exhibit 36-A, the request for payment, read in part as follows:

Itemization of Account:

1-19-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
1-22-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
1-26-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
1-29-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
2-2-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
2-5-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
2-9-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
2-12-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
3-2-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
3-9-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
3-16-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00

* * *

3-23-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
3-30-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
4-6-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
4-13-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
4-20-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
4-27-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
5-4-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
5-11-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
5-25-70	Office Call & Examination	6.00
	Thiomerin Injection	2.00
	Total charges from 1-1-70 thru 5-25-70	160.00
	Paid on Account	27.60
	Balance due	132.40

NO. 74-1484, UNITED STATES OF AMERICA v. LOUIS MARTIN RADETSKY

LEWIS, Chief Judge, dissenting.

I dissent from Part II of my Brother Holloway's opinion relating to the submission of the bill of particulars to the jury and my Brother Barrett's views on that aspect of the case.

This case is by its very nature one of complexity but with careful preparation and presentation that complexity need not have resulted in complete confusion. I am fearful that defendant was convicted on grounds other than proof beyond a reasonable doubt. And, to me, we seem to be perpetuating that confusion.

Recognizing that a bill of particulars is a self-serving prosecutorial document and neither part of the indictment nor evidence, the main opinion states that the prosecution gained an advantage by submitting the document to the jury but the defendant was not prejudiced by such untraditional procedure. But the trial judge termed submission of the bill of particulars as "almost a necessity if the jury is to return an intelligent verdict." In turn, the prosecutor indicated that without submission of the bill of particulars the jury "may well convict on one of the items listed on the request for payment which hasn't even been challenged by the United States."

In sum, I dissent because I believe that a bill of particulars is inherently a self-serving document created by the prosecution which should never be submitted to the jury absent a formal rule and that in this case the prejudice to defendant is glaringly apparent. I would grant a new trial on each count.

No. 74-1484 - United States of America v. Louis Martin Radetsky

BARRETT, Circuit Judge, concurring in part and dissenting in part:

I.

I agree that in this case no prejudice resulted to Radetsky by reason of submission of the bill of particulars, together with the indictment and exhibits, for purposes of aid to the jury during its deliberations. I do not agree with the view that "the submission of a bill of particulars to the trial jury does give some advantage to the Government as a written summary re-emphasizing the prosecution's case". Criminal fraud cases such as this are most difficult to prepare and try. They involve -- just as the record here reflects -- that many laborious, tedious hours are required in order to uncover, unfold, reason upon, plan and develop the proper presentation of a case involving voluminous records and transactions. One is impressed that it seems possible that a defendant who creates a difficult, complicated, jig-saw factual puzzle may in fact succeed in aborting the basic purposes of the criminal justice system. The bill of particulars in this case does not contain any prejudicial or conclusory language. It is in fact analogous to summaries so often prepared by the Trial Court of detailed evidence admitted in complicated tax evasion cases [Oertle v. United States, 370 F.2d 719 (10th Cir. 1966); Sauseverino v. United States, 321 F.2d 714 (10th Cir. 1963)] or summaries prepared by a party relating to voluminous documents or records. We have held that such summaries are admissible if the supporting documents (as in the instant case) are available. Boehm v. Fox, 473 F.2d 445 (10th Cir. 1973); Ryder Truck Rental, Inc. v. National Packing Company, 380 F.2d 328 (10th Cir. 1967). Similarly, a master's report involving an accounting report and damage findings may be treated as an item of evidence entitled to such weight as the jury may accord it. Charles A. Wright, Inc. v. F.D. Rich Co., 354 F.2d 710 (2nd Cir. 1966), cert. denied, 384 U.S. 960 (1966).

II.

I respectfully dissent from the reversal of Radetsky's conviction on 26 of the counts. The criteria adopted by CMS for payment and/or non-payment of the specific drugs in issue does not, as the majority opinion states, make the issue of materiality a matter of law on the predicate (which I deem incorrect from the record) that the agency would not have tendered payments on the respective Requests for Payment filed by Radetsky.

I am troubled with the question as to whether the rule in Bartlett, relied upon in the majority opinion, applies here. On its face, it would appear to control. I have concluded, however, that the complexities of the problems involved in the Medicare payment area do not permit the application of Bartlett. There, the facts were simple and uncomplicated. The misstatement was contrary to express language employed in the statute [15 U.S.C.A. §714m] authorizing payment for delivery of grain only "in store" whereas the application for payment stated that the grain was delivered "F.O.B. bin site". No such simplicity exists in the case at bar.

Reliance on the criteria ignores the expert testimony of Mr. Wells, Vice-President of CMS at the time of trial, who had 25 years experience with Blue Shield. He was thoroughly familiar with Medicare law. CMS serves as contract carrier to safeguard the fiscal integrity of Medicare in Colorado. Under detailed examination relative to the Radetsky claims for payments relating to the 26 counts here at issue, Wells explained the various alternatives of disclosed false versus concealed actual drugs in relation to the manner these could influence the action of Medicare. As the Government so succinctly points out in its brief summarizing Well's testimony: "Two situations are clear. (1) If the disclosed false [drug] is covered, but the concealed actual drug is not, it

is material. (2) If the disclosed false drug is not covered, and the concealed actual drug is not covered under any circumstances, the concealment would not be material." Wells explained a different situation. If the concealed actual drug may be covered, it would influence Medicare. Even if the disclosed false drug were also covered, Medicare would deny the Request for Payment for having concealed the other drug. If the disclosed drug were covered, the concealment of another covered drug defeats Medicare's ability to have meaningful utilization review and measure the relation to diagnoses. (T. 787, 793). Even if the disclosed false drug is not covered, the false statement is material in defeating the Medicare program since a third party -- the patient -- is denied the benefit of the insurance on the actual covered drug. [Brief of Appellee, United States of America, Appendix A, Footnote 46, p. A-12]. It was precisely because of the variety of possible falsities involved that the Trial Court determined, and properly so, that the dispute with respect to whether the Request forms (a) contained misstatements (an essential element of the offense) and/or (b) contained material representations intended to influence Government agency (Medicare) action must be left for jury deliberation and determination as a matter of fact. In my judgment, this setting meets the requirements of Gonzales v. United States, 286 F.2d 118 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961), re-affirmed in United States v. Weiss, 431 F.2d 1402 (10th Cir. 1970) authorizing submission of the issue to the jury for its determination as a matter of fact under proper instructions directing the jury that it must find that a particular matter constitutes a material representation.

Significantly, of the three requested jury instructions on the materiality issue submitted by the Court, two were those prepared by counsel for Radetsky. They met the Gonzales, supra, standards. In my judgment no prejudice resulted to Radetsky. The jurors clearly understood the elements of the offenses charged and that which they must find beyond a reasonable doubt before returning verdicts of guilt.

Failure by Radetsky to make full disclosure under the circumstances did constitute a violation of the statute if -- in the totality of the facts and circumstances reflected by this record -- his intent to defraud the Government, through Medicare, was established beyond a reasonable doubt. The jury so believed. It matters not that no monetary loss or damage to the Government resulted from certain of Radetsky's actions in submitting the false claims. United States v. Godel, 361 F.2d 21 (4th Cir. 1966), cert. denied, 385 U.S. 838 (1966). The important, critical point is that a jury of Radetsky's peers found beyond a reasonable doubt in each of the 26 counts that he submitted the Request for Payment forms with a specific intent to defraud the United States. Intent is ordinarily a fact question for the jury. United States v. Acree, 466 F.2d 1114 (10th Cir. 1972), cert. denied, 410 U.S. 913 (1973). I would affirm.

APPENDIX B

Constitutional Provision, Statutes, and Court Rule Cited

The pertinent text of the fifth amendment to the United States Constitution is as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The pertinent text of the Colorado Medical Practice Act, COLO. REV. STAT. ANN. 1973, 12-36-134 [formerly COLO. REV. STAT. ANN. 1963, 91-3-37, as amended (Perm. Cum. Supp. 1969)] is as follows:

> (1) Persons licensed to practice medicine by the board may form professional service corporations for the practice of medicine under the Colorado corporation code, if such corporations are organized and operated in accordance with the provisions of this section. The articles of incorporation of such corporations shall contain provisions complying with the following requirements:
>
> (a) The name of the corporation shall contain the words "professional company" or "professional corporation" or abbreviations thereof.
>
> (b) The corporation shall be organized solely for the

purposes of conducting the practice of medicine only through persons licensed by the board to practice medicine in the state of Colorado.

(c) The corporation may exercise the powers and privileges conferred upon corporations by the laws of Colorado only in furtherance of and subject to its corporate purpose.

(d) All shareholders of the corporation shall be persons licensed by the board to practice medicine in the state of Colorado, and who at all times own their shares in their own right. They shall be individuals who, except for illness, accident, time spent in the armed services, on vacations, and on leaves of absence not to exceed one year, are actively engaged in the practice of medicine in the offices of the corporation.

(e) Provisions shall be made requiring any shareholder who ceases to be or for any reason is ineligible to be a shareholder to dispose of all his shares forthwith, either to the corporation or to any person having the qualifications described in paragraph (d) of this subsection (1).

(f) The president shall be a shareholder and a director and, to the extent possible, all other directors and officers shall be persons having the qualifications described in paragraph (d) of this subsection (1). Lay directors and officers shall not exercise any authority whatsoever over professional matters.

(g) The articles of incorporation shall provide, and all shareholders of the corporation shall agree, that all shareholders of the corporation shall be jointly and severally liable for all acts, errors, and omissions of the employees of the corporation, or that all shareholders of the corporation shall be jointly and severally liable for all acts, errors, and omissions of the employees of the corporation except during pe-

riods of time when the corporation maintains in good standing professional liability insurance which shall meet the following minimum standards:

(I) The insurance shall insure the corporation against liability imposed upon the corporation by law for damages resulting from any claim made against the corporation arising out of the performance of professional services for others by those officers and employees of the corporation who are licensed by the board to practice medicine.

(II) Such policies shall insure the corporation against liability imposed upon it by law for damages arising out of the acts, errors, and omissions of all nonprofessional employees.

(III) The insurance shall be in an amount for each claim of at least fifty thousand dollars multiplied by the number of persons licensed to practice medicine employed by the corporation. The policy may provide to an aggregate top limit of liability per year for all claims of one hundred fifty thousand dollars also multiplied by the number of persons licensed to practice medicine employed by the corporation, but no firm shall be required to carry insurance in excess of three hundred thousand dollars for each claim with an aggregate top limit of liability for all claims during the year of nine hundred thousand dollars.

(IV) The policy may provide that it does not apply to: Any dishonest, fraudulent, criminal, or malicious act or omission of the insured corporation or any stockholder or employee thereof; the conduct of any business enterprise, as distinguished from the practice of medicine, in which the insured corporation under this section is not permitted to engage but which nevertheless may be owned by the insured corporation, or in which the insured corporation may be a

partner or which may be controlled, operated, or managed by the insured corporation in its own or in a fiduciary capacity, including the ownership, maintenance, or use of any property in connection therewith; when not resulting from breach of professional duty, bodily injury to, or sickness, disease, or death of any person, or to injury to or destruction of any tangible property, including the loss of use thereof; and such policy may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other usual matters.

(2) A copy, certified by the secretary of state, of the articles of incorporation of any corporation formed pursuant to this section shall be filed with the board together with a certified copy of all amendments thereto. At the time of filing the original articles with the board, the corporation shall file with the board a written list of shareholders setting forth the names and addresses of each and a written list containing the names and addresses of all persons who are not shareholders who are employed by the corporation, and who are licensed by the board to practice medicine in the state of Colorado. Within ten days after any change in such shareholders or employees, a written list setting forth the information required by this subsection (2) shall be filed with the board.

(3) The corporation shall do nothing which, if done by a person licensed to practice medicine in the state of Colorado employed by it, would violate the standards of professional conduct as provided for in section 12-36-117. Any violation by the corporation of this section shall be grounds for the board to terminate or suspend its right to practice medicine.

(4) Nothing in this section shall be deemed to diminish or change the obligation of each person licensed to

practice medicine employed by the corporation to conduct his practice in accordance with the standards of professional conduct provided for in section 12-36-117. Any person licensed by the board to practice medicine who by act or omission causes the corporation to act or fail to act in a way which violates such standards of professional conduct, including any provision of this section, shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.

(5) Nothing in this section shall be deemed to modify the physician-patient privilege specified in section 13-90-107(1)(d), C.R.S. 1973.

(6) A professional service corporation may adopt a pension, profit-sharing (whether cash or deferred), health and accident insurance or welfare plan for all or part of its employees including lay employees if such plan does not require or result in the sharing of specific or identifiable fees with lay employees, and if any payments made to lay employees, or into any such plan in behalf of lay employees, are based upon their compensation or length of service, or both, rather than the amount of fees or income received.

(7) Except as provided in this section, corporations shall not practice medicine.

The pertinent text of COLO. REV.STAT. ANN. 1973, 13-90-107(1)(d) [formerly COLO. REV. STAT. ANN. 1963, 154-1-7(5)] is as follows:

> (d) A physician or surgeon duly authorized to practice his profession under the laws of this state, or any other state, shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient; except this section shall not apply to a physician or surgeon who is sued

by or on behalf of a patient or by or on behalf of the heirs, executors, or administrators of a patient on any cause of action arising out of or connected with the physician's care or treatment of such patient, or to physicians or surgeons who were in consultation with the physician or surgeon so sued on the case out of which said suit arises.

The pertinent text of Rule 6(e) of the Federal Rules of Criminal Procedure is as follows:

> Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1576

LOUIS MARTIN RADETSKY, A/K/A L. M. RADETSKY,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-55a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1976. The petition for a writ of certiorari was filed on April 28, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment satisfied the specificity requirement of the Fifth Amendment.

2. Whether petitioner was prejudiced by the submission of the bill of particulars to the jury.

No. 75-1576

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BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
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3. Whether petitioner's privilege against self-incrimination was violated by the admission into evidence of financial and patient records belonging to a professional medical corporation, whose stockholders were petitioner and his wife.

4. Whether petitioner was prejudiced by the government's admonition to grand jury witnesses that they not discuss their testimony without court approval and by the trial court's denial of a request for pretrial inspection of transcripts of grand jury testimony.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner, a licensed osteopath, was convicted on several counts of submitting false medicare claims, in violation of 18 U.S.C. 1001.[1] He was fined $1,500 on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. 1a-55a).

The evidence showed that petitioner requested payments from the medicare program for medical services

[1]Petitioner was indicted on 41 counts of submitting, and on one count of conspiring to submit, false medicare claims. On the government's motion three of the substantive counts were dismissed prior to trial, and the district court later dismissed the conspiracy count. The jury found petitioner guilty on 32 of the 41 substantive counts. The court of appeals, one judge dissenting, reversed his convictions on 26 counts due to insufficient evidence that petitioner's false statements, in the medicare claims which formed the basis of those 26 counts, were material as required by 18 U.S.C. 1001 (Pet. App. 33a-40a). Petitioner's convictions on the remaining six counts were affirmed, with a different judge dissenting (Pet. App. 1a-55a).

Richard Griffin, Gwendolyn Alice Green, and Carolyn Largent were listed as unindicted co-conspirators. Marie Standefer was charged with conspiring with petitioner to submit false medicare claims, but she pleaded guilty to making false statements in connection with medicare claims, in violation of 42 U.S.C. 408 (a misdemeanor), and the conspiracy charge was dismissed.

he had not rendered, misrepresented medical procedures and services, charged the medicare program higher rates than his customary ones for services that he did perform, and inflated the amounts paid by his medicare patients.[2]

ARGUMENT

1. Each of the six substantive counts on which petitioner has been convicted was based on a particular request for medicare payment filed by petitioner.[3] The counts identified the falsehoods in the request as "services" or "charges" or "amount paid" or a combination thereof. Petitioner contends (Pet. 10-12) that these counts did not satisfy the Fifth Amendment's requirement of specificity because each request for payment contained numerous dates when services allegedly were rendered and a large number of specific services and charges, thereby in his view making it "impossible to determine which of the numerous items [dates, services, charges] listed on each request for payment form constituted the basis for the grand jury's indictment" (Pet. 11).

This claim involves only the application of the principles of *Russell* v. *United States*, 369 U.S. 749, to the particular circumstances of this case, and it accordingly does not warrant further review. In any event, the court of appeals gave careful attention to this claim and correctly rejected it. The indictment set forth in detail the unlawful scheme that petitioner employed to defraud the

[2]Under the medicare program patients are supposed to pay 20% of the cost of the medical services they receive. Petitioner was able to obtain 100% payment from medicare, however, by charging medicare inflated prices or by charging for services not rendered. To conceal his scheme, petitioner would represent that the patient had either paid nothing or had paid only 20% of the "unpadded" bill.

[3]See counts 7, 8, 11, 15, 28, 36 (Pet. App. 43a-45a).

medicare program. Each of the six counts was based on a particular request for payment for medical services rendered, each identified the request by date, the time period covered by the request, and the name of the patient, and each designated the source of the material facts (*e.g.*, services, charges, amounts paid, dates) that were challenged as false. This form of indictment is expressly sanctioned by Rule 7(c), Fed. R. Crim. P., which provides that "[i]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means." And, as the court of appeals correctly concluded (Pet. App. 12a), the indictment satisfied all constitutional requirements as well:

> The indictment set forth the essential facts and the nature of the offense charged, and further details fall in the category of evidence on which the case would rest, which the indictment is not obliged to state. See Mims v. United States, 332 F. 2d 944, 946 (10th Cir.); Flying Eagle Publications, Inc. v. United States, 273 F. 2d 799, 802 (1st Cir.). And we feel this is not a case where the grand jury may have had a concept of the scheme essentially different from that relied on by the Government before the trial jury, as in United States v. Curtis, 506 F. 2d 985, 989 (10th Cir.). See also Stirone v. United States, 361 U.S. 212, 217-18.[4]

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[4]The bill of particulars, as to five of the six counts (7, 8, 11, 15, 28), confirmed what would appear to be the plain import of the indictment, *i.e.*, that all of the services, charges, amounts paid, and the two specific dates of house and office calls were false. As to Count 36, the bill of particulars stated that only the first five charges were false in the relevant request for medicare payment submitted by petitioner. In narrowing the scope of the allegations in this manner, the bill of particulars was not being used to cure any defect in the count in contravention of the principles enunciated in *Russell* v. *United States*, *supra*, for, given the overall specificity of the indictment, it did not represent the sort of "guess as to what was in the minds of the grand jury" that *Russell* condemned (369 U.S. at 770).

2. Petitioner also asserts (Pet. 12-15) that it was error for the trial court to submit the bill of particulars to the jurors. The court of appeals agreed with petitioner (Pet. App. 14a-15a),[5] but it refused to reverse his convictions on this ground because it found the error harmless. This factual conclusion warrants no further review.

In any event, petitioner's attempt to show prejudice is premised on his argument that the indictment was defective and that the bill of particulars was used to cure it; but, as we have just shown, the indictment had no defects to cure. Moreover, a comparison of the indictment with the bill of particulars shows that the bill did not elaborate but merely rephrased the description of the offenses in the six counts on which petitioner has been convicted.[6] In short, the bill of particulars added nothing of significance to the indictment and the documentary evidence, all of which was properly submitted to the jury. Since the trial court adequately instructed the jury that neither the indictment nor the bill of particulars was evidence and that the bill merely specified the allegations in the indictment (XVII Tr. 1271-1272, 1275), submission of the bill of particulars to the jury did not rise to the level of prejudicial error, if error it was.[7]

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[5]Judge Barrett evidently found no impropriety in the submission (Pet. App. 52a).

[6]We are lodging a copy of the bill of particulars with the Clerk of this Court.

[7]Contrary to petitioner's claim (Pet. 12-13), the present case does not conflict with *Pipkin* v. *United States*, 243 F. 2d 491, 494 (C.A. 5), where the bill of particulars never went to the jury and the court accordingly did not have occasion to consider whether, if it had, prejudicial error would have resulted. Similarly, in *United States* v. *Borelli*, 336 F. 2d 376, 393 (C.A. 2), also relied upon by petitioner (Pet. 13), the court reversed on an unrelated ground and then observed, without deciding whether it had amounted to prejudicial error, that the bill of particulars should not have been submitted to the jurors since they had not asked for it.

3. Petitioner claims (Pet. 15-16) that his privilege against self-incrimination was violated by the admission into evidence of medical and financial records[8] belonging to the South Denver Clinic, a professional corporation organized in 1969 under Colorado law. Petitioner acknowledged at trial that the records belonged to the clinic and were merely in his custody and control (XIII Tr. 929). The clinic, whose only stockholders were petitioner and his wife, employed two doctors—petitioner and Dr. Griffin—and three clerical or office employees (XIII Tr. 880, 928). According to petitioner's testimony, the patients were considered to be patients of the individual doctors rather than of the clinic in general, but petitioner acknowledged that payments received from Dr. Griffin's patients, or from medicare on these patients' behalf, went to the clinic (XIII Tr. 931-932). In these circumstances the court of appeals correctly ruled that the clinic's records were not petitioner's private property and could not be kept out of evidence by a claim under the self-incrimination clause (Pet. App. 24a; footnote omitted):

> The professional corporation was organized as an independent institutional entity for the continuing conduct of the medical practice of the clinic. Bellis v. United States, 417 U.S. 85, 95-97. The records were not treated as being held by the doctors individually but were held in a representative capacity for the clinic. Id. at 97; Matter of Berry, 521 F. 2d 179, 183 (10th Cir.), cert. denied, 44 U.S.L.W. 3264 (11/4/75). They were not possessed as private property which the Fifth Amendment protects. Matter of Berry, supra at 183.

[8]The records consisted of patients' charts; blue slips showing the test or service rendered and the charge for it; punched business machine accounting cards showing dates of visits by patients, the attending doctor, the service, charges, and credits; and "day sheets" listing all patients patronizing the clinic and the charges made.

See also *In the Matter of Grand Jury Impaneled January 21, 1975*, 529 F. 2d 543 (C.A. 3), certiorari denied, No. 75-1215, May 24, 1976.[9]

4. Petitioner also asserts (Pet. 16-17) that the government's admonition to the grand jury witnesses that they not discuss their testimony without court approval (a restriction not imposed on grand jury witnesses by Rule 6(e), Fed. R. Crim. P.) had the effect of depriving him of a fair trial by interfering with the preparation of his defense. He contends that the unfairness was exacerbated because he also was denied pretrial inspection of transcripts of the witnesses' grand jury testimony.[10] But the transcript of each witness's grand jury testimony was given to petitioner before the direct examination of the witness at trial (V Tr. 83-84; VII Tr. 253; VIII Tr. 342-343; XI Tr. 660-661, 673), and petitioner does not show how in fact the government's admonition or his inability to see the transcripts earlier worked to prejudice him in preparing his defense. The court of appeals thus properly rejected this claim (Pet. App. 28a; footnote omitted):

[9]Even if petitioner were correct that the records were his private property, it would appear under *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, that his privilege against self-incrimination would not be available to resist production of the records in response to subpoena; by the same token the privilege was not violated by introduction of the records into evidence.

[10]The court of appeals concluded that the admonition to the grand jury witnesses was improper and noted that the practice of giving such admonitions has been discontinued in the District of Colorado (Pet. App. 27a and n. 16). To our knowledge no such practice is followed in any other district, and accordingly there would appear to be no need for this Court to consider the question of the propriety of such admonitions.

> No reference is made to any specific prejudice to [petitioner] from not having the transcripts earlier. Regardless of whether the Jencks Act provisions or the particularized need standard applies, see United States v. Quintana, 457 F. 2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877; United States v. Tager, 481 F. 2d 97, 100 (10th Cir.), cert. denied, 415 U.S. 914 (1974), we are satisfied that any error was harmless and not prejudicial. [Petitioner's] position remains in effect a general claim that it was error to deny him the transcripts because they were needed for the defense, and this is not enough. United States v. Addington, 471 F. 2d 560, 569 (10th Cir.).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1976.